He emphasized that running for office should not be a simple function of money.

In spite of this adversity, the appetite for reform remains strong, and State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived *per se* barrier. For example, as noted by The Hoover Institution:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98.
- From 1972-1996, 45 initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment.
- 24 states, as of 1998, have statutes on the books providing some sort of public financing for election campaigns. Also, 12 states and New York City have some form of expenditure limitation.
- What these various states – and many municipalities – have in common is strong voter sentiment for change, harnessed by diverse grassroots coalitions and reform-minded legislators.[13]

100th Cong. (1st Sess. 1987); H.R. 1456, 101st Cong. (1st Sess. 1988); H. Res. 168, 103rd Cong. (1st Sess. 1993); H.R. 3571, 103rd Cong. (1st Sess. 1993); H.R. 3651, 104th Cong. (2d Sess. 1996); H.R. 3658, 104th Cong. (2d Sess. 1996); S. 1057, 105th Cong. (1st Sess. 1997); H.R. 77, 105th Cong. (1st Sess. 1997). *Id.* at 41, n.17.

[13] *Hoover Institution: Public Policy Inquiry, Campaign Finance, State and Local Overview, at* http://www.campaignfinancesite.org/structurestates1.html (last updated Sept. 20, 2004).

Various state and federal polls confirm that voters are overwhelmingly in favor of more effective campaign finance reform.

- Between 1976 to 1986, campaign spending in West Virginia state Senate races increased an average of 875% from approximately $155,000 to $1,511,000. In 1986, a sample of West Virginia voters were polled regarding whether they believed "there should be a limit on how much a person can spend on running for public office." 75.5% said yes, 16.8% said no, and 7.7% were undecided.[14]

- 64% of Arizonans support public funding for campaigns (Arizona Republic poll, Oct. 2002) and 66% specifically support Clean Elections (KAET poll, June, 2002). 80% of Arizonans believe that contributions influence votes on public policy (Behavior Research Center poll, December, 2001).[15]

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[14] Hechler, *Financing Elections*, *supra* note 5. In its 1990 sessions, West Virginia's House of Delegates "passed, by a vote of 86-14, a constitutional amendment 'to amend the State Constitution to permit the Legislature to limit the amount of money which can be spent advocating or opposing a nomination or election of any candidate, or the passage or defeat of any issue, thing or item to be voted upon at public election.' The elation of supporters of the constitutional amendment, scheduled to be placed on the general election ballot in 1990, was short-lived, however. The state Senate quickly buried the amendment by double referencing it to the Government Organization and Judiciary Committees, where it died without further consideration despite frantic and repeated efforts of the secretary of state to revive it." *Id.*

[15] California Clean Election Campaign, *Arizona – Clean Elections Works! at* http://www.caclean.org/content/victories/az_works.php?path=content/victories/az_works.php&.

2. At various times and in various contexts, this Court has espoused the value of deferring to the legislative process to produce creative solutions to pressing social problems. Indeed, it is a canon of this Court that such cases should be decided narrowly. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 688 (2003). Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists. As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion) (cited in *Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). *Cf. Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (the "challenging task of crafting procedures for

safeguarding ... liberty interests is entrusted to the 'laboratory' of the states ... in the first instance.")

This Court should remove the artificial limit on States and localities imposed by a *per se* prohibition on campaign spending limits and, instead, make clear that the proper standard of review of such legislation is and will be meaningful scrutiny that is not "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

3. The current split among the circuits on this important issue demonstrates that it should be clarified by this Court. By clarifying *now* that no *per se* barrier is imposed by the First Amendment, this Court will be opening an avenue of reform to the States and localities eager to enact reform that they have avoided because of the belief that *Buckley* imposes a *per se* barrier to campaign spending limits.

Allowing the perception that the Sixth and Tenth Circuits correctly interpreted *Buckley* deprives citizens who reside within those Circuits of the creativity of the State and local legislatures whose spending limits legislation would surely be struck down.

The perception of a *per se* barrier constrains the legislative process in States and localities outside of those circuits. The chilling effect that flows from the uncertainty inherent in a circuit split is further compounded by the fact that every panel of circuit judges that has considered this issue has split on the question of whether *Buckley* imposes a *per se* barrier. The decision by the Second Circuit not to hear *Landell en banc*, alone, generated a 50-plus page collection of concurrences and dissents for a type

of decision typically disposed of with a single sentence. This effect cannot be ignored, for it extends far beyond the Tenth and Sixth Circuits.

Amici urge this Court to grant certiorari to decide whether to free our State and local legislatures from the constraints on their ability to experiment in the realm of campaign finance reform that are the byproduct of the belief that the First Amendment imposes a *per se* prohibition on campaign spending limits laws.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

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VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

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BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, DEMOS, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND RECLAIMDEMOCRACY.ORG IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

TheRestofUs.org is a nonprofit, nonpartisan organization whose mission is to reduce the influence of money on the

political process.[1] TheRestofUs.org works to inform and educate mainstream Americans, including the citizens of Vermont, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field. The organization has an interest in engaging citizens in the reform process, and the current perception that all spending limits are *per se* unconstitutional presents a significant barrier to the organization's work. TheRestofUs.org hopes the Court will take this opportunity to clarify the constitutionality of limits on campaign spending.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of Vermont PIRG, other state PIRGs have an interest in enacting spending limits in their states. U.S. PIRG believes that a clarification by the Court of the circumstances in which expenditure limits are constitutional would assist the State PIRGs in advocating for comprehensive campaign finance reform.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including Vermont, Common Cause's mission is to ensure open, accountable and effective government at the federal, state, and local level. Common Cause has a longstanding concern with problems in the nation's campaign finance system, including publicly advocating for the spending limit provisions of the Federal Election Campaign

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, and participating in the defense of FECA before the Supreme Court.

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in approximately a thousand communities and in every state, and numbers 150,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Demos is a nonprofit organization whose purpose is to help build a society in which America can achieve its highest ideals. Demos believes that this goal requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Demos believes that campaign spending limits, like those adopted by Vermont, help foster these goals by reducing the appearance of impropriety in political campaigns, increasing electoral competition, and allowing more of the electorate's voice to be heard.

Public Campaign is a nonprofit, nonpartisan organization dedicated to campaign reform that aims to reduce the role of big special-interest money in American politics. Public Campaign works with a range of organizations, including

some in Vermont, whose members are not fairly represented under the current campaign finance system in many states. Public Campaign believes that through state and national campaign reforms, like Vermont's Act 64, more citizens will seek elective office and become interested in local political affairs.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan organization that, through litigation, focuses Americans, including the citizens of Vermont, on unethical conduct on the part of government officials. CREW's aim is to encourage government officials to act in the public interest. CREW believes that campaign-spending limits, like those approved by Vermont, are an effective way to accomplish this goal.

ReclaimDemocracy.org is a nonprofit organization with a national membership that includes Vermont residents. The organization works to build a genuinely representative democracy based on the principle that one's influence should result from the quality of one's ideas and the energy put into promoting them, independent of one's financial status. If wealth is a determining factor in the ability of either voters or candidates to make their voices heard in electoral races, ReclaimDemocracy.org believes that the Constitution's promise of "equal protection of the laws" has been broken. ReclaimDemocracy.org asks the Court to affirm the State of Vermont's right to protect the equal protection guarantee of the Fourteenth Amendment through reasonable limits on campaign spending.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional national importance: whether interests beyond those addressed in *Buckley v. Valeo*, 424 U.S. 1 (1976), can justify state-enacted campaign expenditure limits governing candidates for state office. In an effort to address on a state level problems striking at the heart of democratic government, the Vermont

legislature enacted Act 64 in 1997 to limit (1) political-party donations to candidates, (2) donations from out-of-state contributors, and (3) candidate expenditures. After a series of appeals ending in the Second Circuit's denial of a rehearing *en banc*, the Second Circuit upheld the possible constitutionality of expenditure limits and recognized that *Buckley* did not impose a sweeping "fatal in fact"[2] strict scrutiny to all forms of expenditure limits.

As the Court has recognized since *Buckley*, unfettered campaign donations to and expenditures for political campaigns can create an appearance of impropriety and a perception that elected officials respond only to the special interests from which the money flows, thereby diminishing other citizens' confidence in government and discouraging those citizens from participating. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 147-48 (2003); *Buckley*, 424 U.S. at 26-27, 46-47; *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Campaign finance laws enacted in the wake of *Buckley* have not stemmed the tide of huge donations and expenditures that has overwhelmed modern political campaigns. *See McConnell*, 540 U.S. at 144-52. But although corruption concerns affect state government as well as federal government, state governments consider, and indeed are motivated by, other interests as well when shaping their electoral processes.

This Court has not, in the time since *Buckley*, specifically considered how and to what extent concerns other than corruption or the appearance of corruption balance the well-recognized First Amendment considerations implicated by

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[2] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

campaign finance restrictions in state elections. Vermont's experiment in campaign finance reform represents a state solution to state problems, even if the same problems exist at the federal level as well. *Buckley*'s standard of strict scrutiny review for expenditure limits recognized that campaign expenditure limits could be justified by interests beyond corruption. Given the importance of these other interests to the integrity of state elections, federalism concerns warrant a different and more flexible balancing of these interests when the limitations apply solely to state elections.

Amici respectfully request that the Court grant the petitions as to question one and the conditional cross-petition, particularly since this case presents the only certain opportunity for the Court to consider and resolve these critically important issues. Vermont is currently the only state with mandatory expenditure limits. The evolving lower court applications of *Buckley*, including the Tenth Circuit's recent view that *Buckley* bans all expenditure limits,[3] have made state legislatures reluctant to consider including expenditure limits in new reform legislation even when they believe they would be helpful in reducing corruption and meeting other state interests.[4] *Amici* ask this Court to speak to the question of the constitutional scope of state discretion

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[3] *Homans v. Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004).

[4] For two reasons, the trend of state legislatures and localities is to reject new campaign spending legislation that imposes mandatory expenditure limits. First, many states believe that mandatory expenditure limits are *per se* unconstitutional under *Buckley*, and more recently, *Homans*. Second, states are reluctant to enact mandatory expenditure limits because doing so opens them up to litigation similar to that facing the State of Vermont in the instant case. Until this Court clarifies the legal standards, efforts by states to enact expenditure limits as part of broader reform are likely to be very difficult to pass and, if passed, to lead to protracted litigation.

in this area, so the states have some guidance to inform their consideration of expenditure limits, not just a knee-jerk fear that they can never be defended under a strict scrutiny standard.

REASONS FOR GRANTING THE WRIT

I. *BUCKLEY* DOES NOT PRECLUDE STATE REGULATION OF CAMPAIGN EXPENDITURES.

The Second Circuit appropriately applied *Buckley v. Valeo*, 424 U.S. 1 (1976), to hold that limitations on campaign expenditures are not precluded *in toto*. *Buckley* expressly left open the possibility that expenditure limits, when sufficiently tailored, can pass constitutional muster. This case demonstrates that possibility, and gives the Court the opportunity squarely and cleanly to confirm the Second Circuit's ruling that important state interests beyond avoiding corruption balance against competing First Amendment interests, and to calibrate an appropriate constitutional test that shows due deference for federalism concerns.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA"), reforms Congress passed to prevent corruption and its appearance and maintain the integrity of the electoral process. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On the record before it, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify...[the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). The Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh relevant First Amendment concerns. *See id.*; *see also Landell v. Sorrell*, 382 F.3d 91, 107-10 (2d Cir. 2004).